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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD JAMES MILLS II,

Defendant and Appellant.

A093165

(Lake County
Super. Ct. Nos. CF 25306.01,
CF 27183.01)

Appellant Richard James Mills II appeals from a judgment sentencing him to prison for a total of 13 years four months after a guilty plea and an admission of a probation violation. Appellant's failure to obtain a certificate of probable cause forecloses his challenge to the validity of his plea and admission, and he has made no showing that the trial court relied on any improper information when it imposed sentence. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Case No. 25306.01

In October 1999, appellant pled guilty to one count of first degree burglary. (Pen. Code, § 459.) Describing the facts underlying the plea, the probation report states that appellant and an accomplice took over \$8,000 worth of personal property from a resort guestroom, which they entered with a master key. The court suspended imposition of sentence and placed appellant on probation for four years on several conditions, including participation in a residential substance abuse treatment program. In April 2000, the court

summarily revoked probation after appellant failed to maintain contact with the probation department and left the treatment program.

B. Case No. 27183.01

In June 2000, the district attorney filed a complaint charging appellant with multiple offenses and alleging a prior strike conviction. In August 2000, to effectuate a plea agreement, the district attorney filed an amended complaint charging appellant in count I with possession of ephedrine with the intent to manufacture methamphetamine and in count II with resisting a peace officer in the performance of his duties. The complaint also alleged a prior strike conviction. (Health & Saf. Code, § 11383, subd. (c); Pen. Code, §§ 148, subd. (a)(1), 667, subds. (b)-(i).)

Describing the underlying facts, the probation report states that on the evening of June 28, 2000, agents of the Lake County Narcotics Task Force went to a room at a Lakeport inn looking for appellant, who was wanted on outstanding arrest warrants. They found two women who displayed symptoms of being under the influence of a controlled substance. Searching the room for appellant, the agents found indicia in appellant's name and several items associated with the manufacturing of methamphetamine: "4 clear plastic cups containing a white and red liquid, a plastic one liter bottle containing a white and red liquid, 3 boxes of 'Long's' suphedrine tablets, 1 full bottle of 'Heet,' a small plastic bag containing five syringes, and several coffee filters with a red substance." The agents did not find appellant.

Later that night, agents who had remained on the scene saw appellant drive into the parking lot. When appellant recognized them, he accelerated backward. One agent yelled at appellant to stop, but he kept backing up and the agent had to move out of the path of his car. Appellant stopped and then accelerated forward rapidly, but his tires spun, causing the car to hit a support beam in front of the inn and stop.

After the agents took appellant into custody, he handed them a plastic bag, saying it was "dope" that he did not want to take to jail. The substance, weighing 1.27 grams, tested positive for the presence of methamphetamine. In the vehicle, agents found a large Rubbermaid box containing numerous coffee filters heavily stained dark red and a foil-

wrapped substance weighing about 1.00 gram, which also tested positive for methamphetamine. A field investigative report from the California Department of Justice, Santa Rosa Regional Criminal Laboratory indicated that the chemicals collected were “consistent in appearance with the manufacturing of methamphetamine.”

C. The Plea and The Sentence

Appellant pled guilty to the charged crimes and admitted the prior conviction in case No. 27183.01; he also admitted the violation of probation in case No. 25306.01. At the sentencing hearing, the trial court denied appellant’s motion to strike the prior and sentenced him to prison for 13 years four months: the upper term of six years on count I in case No. 27183.01, doubled to 12 years pursuant to Penal Code section 667, and a consecutive term of one year four months in case No. 25306.01. Later, the court amended the sentence to include a concurrent term of six months for the violation of Penal Code section 148 (count II in case No. 27183.01).

Appellant’s notice of appeal, signed by his appellate counsel, states that the appeal is from the conviction, sentence, and judgment. The notice also states that the grounds for the appeal include “[s]entencing error and/or abuse of discretion at sentencing.” The record does not include a certificate of probable cause. (See Pen. Code, § 1237.5; Cal. Rules of Court, rule 31(d).)

ADMISSION OF PRIOR CONVICTION AND PROBATION VIOLATION

Appellant contends he was not properly advised of his constitutional rights before he admitted the prior conviction and the probation violation, but the issue is not cognizable in this appeal.

A defendant who has been convicted on a guilty plea or who has admitted a probation violation must obtain a certificate of probable cause from the trial court to obtain review on appeal of issues going to the validity of the plea or the admission. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 31(d); see *People v. Mendez* (1999) 19 Cal.4th 1084, 1095, 1098-1099.) Because appellant’s admission of the prior conviction was an integral part of his plea agreement, he was also obligated to obtain a certificate to challenge the validity of that admission on appeal. (See *People v. Sturns* (2000) 77

Cal.App.4th 1382, 1389-1391; *People v. Breckenridge* (1992) 5 Cal.App.4th 1096, 1098-1099; *People v. Arwood* (1985) 165 Cal.App.3d 167, 171-172.) Appellant did not obtain a certificate from the trial court and we denied his request for leave to obtain and file a late certificate. (See *People v. Sturns*, *supra*, 77 Cal.App.4th at pp. 1391-1398 [length and reasons for delay are factors in determining whether good cause exists for relief from failure to file a timely request for certificate].) Appellant concedes, as he must, that without a certificate, he is foreclosed from challenging his admissions of the prior conviction and the probation violation in this appeal. Thus the only issue before us is appellant's contention that error occurred at the sentencing hearing. (See Cal. Rules of Court, rule 31(d) [certificate requirement inapplicable to grounds occurring after entry of plea that do not challenge its validity].)

THE SENTENCE

Appellant asserts that the presentence probation report included factually unsupported information about his suspected involvement in uncharged crimes and that the prosecutor committed misconduct by making similar unsupported assertions at the sentencing hearing. Appellant argues that remand for resentencing is required because he was prejudiced by this information.

A. Background

The probation report included a section titled "AGENCY CONTACTS," which states that an agent of the Lake County Narcotics Task Force described appellant as "a significant player in the methamphetamine culture in Lake County." The agent told the probation officer that in March 2000, while agents were in the process of obtaining a search warrant for a lab on Cobb Mountain, an agent was left at the scene for control purposes. "[I]t is suspected that [appellant] is the party that snuck into the area and threw a Molotov Cocktail, which torched off the lab." The report added that task force members feel that appellant is "a dangerous person."

At the sentencing hearing, the court first heard argument on appellant's motion to strike his prior conviction. Opposing the motion, the prosecutor emphasized appellant's criminal record and consistent failure to comply with the terms of probation. The

prosecutor added, “In between that time I’ve had at least three other methamphetamine laboratories where we were probably 24 to 72 hours behind this individual; and the other defendants, that we caught in those laboratories, were turning around, saying, ‘Hey, I’m just holding this stuff for [appellant].’ [¶] [Appellant] then acquired the most recent case, where he had the laboratory equipment, the ephedrine and the finished product, scattered between his vehicle and a room at the Anchorage Inn.” The prosecutor added that appellant has “run a string of methamphetamine labs” and was “involved in the commercial trafficking of narcotics.” The prosecutor also urged that the appellant’s current offense was “a commercial narcotic offense.”

Appellant’s counsel asked the court to strike these comments by the prosecutor and the “Agency Contacts” section of the probation report, arguing that they were without evidentiary support. Without ruling on that request, the court denied the motion to strike the prior. Explaining its reasons, the court stated: “The defendant has a significant prior record of increasing seriousness. [¶] He has a longstanding substance abuse problem. [¶] It appears that his first conviction for something related to substance abuse was in 1994. [¶] He’s been on various grants of probation to give him a [chance] to deal with those particular issues, has taken advantage of none of them. [¶] The nature of this offense was very serious, and it’s not just that he has a methamphetamine addiction, but that he is deeply involved in a commercial enterprise involving manufacture and distribution of methamphetamine.” Appellant did not object to the court’s explanation of the reasons for its ruling.

The court then imposed the upper term for the possession of ephedrine. It explained that it found two circumstances in aggravation: appellant’s prior convictions as an adult were numerous and of increasing seriousness, and he was on felony probation when the crime was committed. The court found as a circumstance in mitigation that appellant voluntarily acknowledged wrongdoing at an early stage in the criminal process. It concluded that the circumstances in aggravation outweighed those in mitigation, “both in number and in weight.” Finally, the court imposed a consecutive term for the first

degree burglary, explaining that the crimes were committed at different times and in different places.

B. Discussion

Based on the court's statement describing him as "deeply involved in a commercial enterprise," appellant asserts that the court necessarily relied on the unsupported information in the probation report and the prosecutor's improper comments.

Appellant's motion to strike his prior conviction required the trial court to consider not only the nature and circumstances of his present crime and his prior serious or violent felony convictions, but also "the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The court was entitled to obtain this information from the probation report. (*People v. Superior Court (Roam)* (1999) 69 Cal.App.4th 1220, 1228, citing *Williams, supra*, 17 Cal.4th at pp. 148-155, 162.)

To ensure fundamental fairness, the information in the probation report must of course be reliable and accurate. "Thus, evidence of police contacts not leading to arrest or conviction may not be included in the report without supporting information. [Citations]." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719.) Adequate supporting information is necessary to provide the sentencing court with a sound basis for evaluating the reliability and relevance of the evidence and to avoid misleading the court about its significance. (See *People v. Tobia* (1979) 98 Cal.App.3d 157, 165; *People v. Phillips* (1977) 76 Cal.App.3d 207, 215.) The court should accord little weight to allegations of suspected involvement in other crimes that are without adequate factual support. If such allegations are made, defense counsel is free to exploit this weakness at the sentencing hearing. (See *People v. Chi Ko Wong, supra*, at pp. 720-721 & fn. 18.)

Furthermore, a prosecutor is not free to make unsupported assertions at a sentencing hearing about a defendant's involvement in uncharged crimes. A prosecutor may comment on the evidence in the record and argue that inferences about the nature of the defendant's criminal activity may be drawn from that evidence. It is misconduct,

however, for the prosecutor at a sentencing hearing to refer to matters outside the record. (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 64-65.)

Nevertheless, the presence in a probation report of statements without adequate factual support does not demonstrate that the trial court has erred. If there is no indication that the court has been misled by such statements, there is no error. (*People v. Phillips, supra*, 76 Cal.App.3d at p. 215; *People v. Morales* (1975) 49 Cal.App.3d 732, 738.) Even if an appellant demonstrates possible confusion about the accuracy of information in a probation report, reversal is not required unless he also shows that the court “materially relied” on a mistaken belief in imposing sentence. (*People v. Phillips, supra*, 76 Cal.App.3d at p. 215.) Similarly, improper comments by a prosecutor at a sentencing hearing do not require reversal unless it is reasonably probable that the court would have imposed a more lenient sentence absent the comments. (See *People v. Vatelli, supra*, 15 Cal.App.3d at p. 64.)

In this case, while the court did not expressly rule on appellant’s objections to the probation report or the prosecutor’s comments, appellant has made no showing that the court was misled by, or relied on, any unsupported allegations about uncharged criminal conduct. The court did not refer to any such allegations when it explained its reasons for imposing the upper term and for sentencing consecutively. The court did mention appellant’s involvement in a commercial methamphetamine enterprise at the conclusion of its statement of reasons for denying the motion to strike the prior. But from the context of that remark, it is apparent that the court was referring to the nature and circumstances of the charged crime, not to the allegations of the probation report or the prosecutor about appellant’s suspected involvement in other offenses. Appellant pled guilty to possession of ephedrine with the intent to manufacture methamphetamine. Based on the evidence found in his room and on his person and in his vehicle when he was arrested, the court’s conclusion about the commercial nature of that manufacturing endeavor was reasonable. Appellant’s claim of sentencing error is without merit.

DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Swager, J.